

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>LYNNE F. MELTON</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 256,075
<b>SEDGWICK COUNTY</b>	)	
Respondent	)	
Self-Insured	)	

**ORDER**

Respondent appeals from the March 7, 2002 Award of Administrative Law Judge John D. Clark. Claimant was awarded a 29.5 percent permanent partial general body disability based upon a 14 percent loss of work tasks and 45 percent loss of wages under K.S.A. 1999 Supp. 44-510e. The Appeals Board (Board) held oral argument on October 2, 2002.

**APPEARANCES**

Claimant appeared by her attorney, J. Darin Hayes of Wichita, Kansas. Respondent appeared by its attorney, E. L. Lee Kinch of Wichita, Kansas.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. In addition, at oral argument before the Board, the parties stipulated claimant's average weekly wage for purposes of this Award equates to \$884.33 straight time, with \$119.35 in fringe benefits, for a total average weekly wage of \$1,003.68 for the October 16, 1999 date of accident.

**ISSUES**

- (1) What is the nature and extent of claimant's injury and disability?
- (2) What is the amount of compensation due and owing?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board finds that the Award of the Administrative Law Judge should be modified to award claimant a 14 percent loss of tasks and a 33 percent loss of wages, for a permanent partial general disability of 23.5 percent to the body as a whole.

Claimant began working for respondent in 1978 as an office associate. Over the next 21 years, claimant's job duties and job title modified. In 1983, she began working for the Department of Aging, ultimately working her way up to assistant director. Claimant's job duties with respondent were many and varied. Over the years, claimant began developing problems with her hands. On September 9, 1999, she filed an on-the-job incident report alleging carpal tunnel syndrome with an accident date covering the preceding 15 years. Claimant's main symptom was that her hands would go to sleep. However, claimant also experienced pain in her hands.

Claimant was referred by her supervisors to Dr. Wilkinson, who ordered nerve conduction studies which confirmed carpal tunnel syndrome. She was later referred to board certified orthopedic surgeon J. Mark Melhorn, M.D., a specialist in hand pathology. Claimant underwent surgery for right carpal tunnel on January 8, 2000, and for left carpal tunnel on February 1, 2000. Dr. Melhorn released claimant with a 5.8 percent impairment to the right forearm and a 5.8 percent impairment to the left forearm, which combine to a 6.4 percent whole body functional impairment pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

At the time of her termination, claimant had been on probation with respondent for several months. Claimant's last day of work with respondent was October 16, 1999, with an official retirement date of November 1, 1999. For purposes of this Award, the parties have agreed that October 16, 1999, would be claimant's date of accident.

At the time of claimant's termination, she was offered a position with respondent at a much lower rate of pay. Respondent's human resources director, Douglas S. Russell, stated that the offer to claimant was in a 19 range, between steps one and three. This would have paid a salary between \$26,000 and \$27,600 per year. Claimant refused the offer and elected, instead, to retire.

Claimant objected to the procedures followed by respondent as claimant had been placed on a six-month probationary evaluation period. At the time of her termination, claimant had only been on probation for approximately four months of the total period. The Administrative Law Judge found respondent's actions leading to claimant's termination constituted bad faith. The Board acknowledges the activities by respondent were suspect.

After leaving respondent, claimant immediately obtained employment with Community Housing Services at an annual salary of \$35,000 per year. This position, which claimant described as an interim position, was originally only supposed to last four months. However, claimant maintained her employment in that position for fourteen months, until December 22, 2000. At that time, claimant stopped seeking employment because she was providing care for her 85-year-old mother. Claimant has not looked for employment since that time.

Claimant was referred for an independent evaluation at the request of the Administrative Law Judge to Philip R. Mills, M.D., board certified in physical medicine and rehabilitation. Dr. Mills examined claimant on October 17, 2000, diagnosing bilateral carpal tunnel syndrome, which he opined resulted from her work with respondent. He found claimant to be status post bilateral carpal tunnel surgery with mild residuals. He restricted claimant from repetitious wrist flexion and extension, and recommended she avoid pounding activities with her wrist. He assessed claimant a 12 percent impairment to the body as a whole pursuant to the *AMA Guides* (4th ed.).

Claimant was referred for an evaluation to Dennison R. Hamilton, M.D., in Kansas City, Missouri, by claimant's attorney. He examined claimant on June 28, 2000, diagnosing bilateral carpal tunnel syndrome. Dr. Hamilton, in utilizing the *AMA Guides* (4th ed.), found claimant to have a 28 percent whole person functional impairment. He restricted claimant from repetitive hand use, including the use of keyboards, calculators and long-term writing, and warned against hobbies that require any repetitive hand activities.

Claimant was also referred by her attorney to Pedro A. Murati, M.D., board certified by the American Board of Physical Medicine and Rehabilitation. Dr. Murati, after diagnosing bilateral carpal tunnel syndrome, assessed claimant a 17 percent impairment to the body as a whole based upon the *AMA Guides* (4th ed.). He also restricted claimant from climbing ladders and crawling, and limited her to occasional repetitive hand use, with no repetitive grasping or grabbing, occasional lifting, pushing, pulling and carrying of 20 pounds, with frequent lifting, carrying, pushing and pulling limited to 10 pounds. Claimant was also restricted from the use of hooks or knives and vibratory tools. While using keyboards, claimant was limited to fifteen minutes on, forty-five minutes off.

Dr. Mills, Dr. Murati and Dr. Melhorn were all provided task opinions from vocational experts. Dr. Melhorn and Dr. Murati were provided the task list prepared by vocational expert Jerry D. Hardin, with Dr. Mills reviewing the task list prepared by vocational expert Karen Crist Terrill. Dr. Melhorn felt claimant had lost the ability to perform 13 percent of the work tasks that she performed over the 15 years prior to her accident. Dr. Murati felt claimant had lost the ability to perform 37 percent of the tasks set forth in Mr. Hardin's task list. There was some question raised regarding the accuracy of Dr. Murati's math, as, of the twenty-three tasks on the list, he felt she was incapable of performing ten, which would

be a 43 percent task loss. Dr. Mills, in reviewing the list of Ms. Terrill, found claimant incapable of performing 14 percent of the tasks.

The Administrative Law Judge, in reviewing the opinions of the various doctors, found that the opinion of Dr. Mills, the court appointed independent medical examiner, was most persuasive and adopted that opinion, finding claimant had lost the ability to perform 14 percent of the work tasks she had performed in any substantial gainful employment during the 15 years preceding the accident. The Board concurs and finds claimant has suffered a 14 percent loss of work tasks.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to the benefits requested by a preponderance of the credible evidence.<sup>1</sup>

K.S.A. 1999 Supp. 44-510e provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

K.S.A. 1999 Supp. 44-510e must, however, be read in light of *Foulk*<sup>2</sup> and *Copeland*.<sup>3</sup> In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption of having no work disability from K.S.A. 1999 Supp. 44-510e by refusing to attempt to perform an accommodated job which the employer has offered and which paid a comparable wage. In this instance, it is acknowledged that, while respondent offered claimant a job, that job did not pay a comparable wage.

The Board must also consider the Court of Appeals policy set forth in *Copeland*, which held, for purposes of the wage loss prong of K.S.A. 1999 Supp. 44-510e, that a worker's post-injury wage should be based upon his or her ability rather than actual wages when a worker fails to make a good faith effort to find appropriate employment after recovering from the injury.

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<sup>1</sup> See K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

<sup>2</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

<sup>3</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

The Administrative Law Judge determined that claimant's post-injury average weekly wage was \$514.79 which is the mid range of the range 19, step two, salary offered to claimant by respondent.

However, immediately upon retiring from respondent, claimant obtained employment with Community Housing Services, earning \$35,000 per year. While it was acknowledged that this was a temporary position, it nevertheless lasted for 14 months. The Board does not find that claimant's refusal to accept the job offer by respondent was not good faith. Claimant was being offered what was obviously a demotion. Instead, she obtained immediate employment at a salary several thousand dollars per year higher than that offered to her by respondent. The Board will, therefore, utilize claimant's \$35,000 salary, which she earned through December 22, 2000, when that job terminated.

After the termination of the Community Housing Services job, claimant ceased looking for any type of employment. She, instead, stayed home with her 85-year-old mother. The Board finds pursuant to *Copeland, supra*, that claimant did not put forth a good faith effort to obtain employment after December 22, 2000. *Copeland* requires that, when a good faith effort has not been made, the fact-finder must determine an appropriate post-injury wage based upon all the evidence before it, including any expert testimony concerning claimant's capacity to earn wages.<sup>4</sup> The record contains the opinions of two experts regarding claimant's ability to earn wages. Karen Terrill found claimant able to work in the \$30,000- to \$35,000-per-year salary range with \$35,000 as the top end. Jerry Hardin opined that claimant could earn a weekly wage of \$673.08, which conveniently computes to a \$35,000-per-year straight salary. These opinions, coupled with the fact claimant immediately found a job earning \$35,000 per year after leaving respondent, convince the Board that claimant's ability to earn wages is best represented by the \$35,000-per-year salary she was earning and which both Ms. Terrill and Mr. Hardin opined she was able to earn. Accordingly, claimant's post-injury average weekly wage is \$673.08 for a 33 percent loss of wages. This wage loss, when averaged with the 14 percent loss of tasks, equates to a 23.5 percent permanent partial general disability pursuant to K.S.A. 1999 Supp. 44-510e.

The parties stipulated at regular hearing that respondent is entitled to a setoff of \$113.00 per week as provided in K.S.A. 1999 Supp. 44-501(h). The Board, therefore, modifies the Award of the Administrative Law Judge to award claimant a 23.5 percent permanent partial general disability based upon a date of accident of October 16, 1999, claimant's last date of employment with respondent.

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<sup>4</sup> *Copeland*, at 320.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated March 7, 2002, should be modified and an award granted in favor of the claimant, Lynne F. Melton, and against the respondent, Sedgwick County, a self-inured, for an accidental injury occurring through October 16, 1999, for a 23.5 percent permanent partial general disability.

Claimant is entitled to 97.53 weeks permanent partial general disability compensation at the rate of \$383 per week, minus the respondent's stipulated setoff of \$113 per week, giving claimant a net payment of \$270 per week for a total award of \$26,333.10.

As of the date of this Award, the entire amount is due and owing and ordered paid in one lump sum minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does contradict the findings and conclusions contained herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: J. Darin Hayes, Attorney for Claimant  
E. L. Lee Kinch, Attorney for Respondent  
John D. Clark, Administrative Law Judge  
Director, Division of Workers Compensation